IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 72 of 2002
with
CRIMINAL APPEAL No. 91 of 2002

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA
HONOURABLE MR.JUSTICE K.A.PUJ

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SALIM ALABAKSH AJMERI - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :

CRIMINAL APPEAL NO. 72 OF 2002

MR MAHESH BHAVSAR for Appellant(s) : 1,
MR. K.T.DAVE, APP for Respondent(s) : 1,

CRIMINAL APPEAL NO. 91 OF 2002

MR. K.T.DAVE, APP for Appellant

MR. M.H.BAREJIA for Respondent

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 10/11/2006

COMMON ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.M.KAPADIA)

1. Challenge in these two Criminal Appeals is to the correctness of the judgement and order dated 24.10.2001 rendered in Sessions Case No. 168 of 2000 by the learned Additional Sessions Judge, Court No.9, City Sessions Court, Ahmedabad. By impugned judgement and order, Salim Alabaksh Ajmeri-the Appellant (A-2) of Criminal Appeal No. 72 of 2002 has been convicted for the offence punishable under Section 21 of the Narcotic Drugs & Psychotropic Substances, Act, 1985 (“NDPS Act” for short) and sentenced to suffer RI for 10 years and fine of Rs. 1,00,000/-, and in default of payment of fine RI for further period of 2 years, whereas Abbasmiya Sharifmiya Saiyed-Respondent (A-1) of Criminal Appeal No. 91 of 2002 has been acquitted of the offence with which he was charged.

2. Aggrieved by the impugned judgement and order, A-2 has filed Criminal Appeal No. 72 of 2002 u/s 374 of the Code of Criminal Procedure (“the Code” for short), challenging his order of conviction and sentence, whereas the State of Gujarat has filed Criminal Appeal No. 91 of 2002 against the Respondent A-1 u/s 378 of the Code, challenging the order of acquittal of the A-1.

3. The prosecution case as disclosed from the FIR and unfolded during trial is that, on 22.1.2000 PW-3 – Madarsinh Bhikhaji Solanki received secret information that one Yasminbanu Noormohmed Shaikh, accused no.3 (A-3), who was not before the Court, was running the business of selling contraband article, i.e. Brown Sugar through her persons, in her house, situated at Mamuji Khancho Dadamiya Gali, Dariyapur. A-1 and A-2 are retained by her for such purpose and they would be trafficking in the said Brown Sugar and transporting it. The information further stipulated that one Abbasmiya Sharifmiya Saiyed (A-1) would be coming driving a Scooter bearing registration No. GCC-2880 and Salim Alabaksh Ajmeri (A-2) would be rider and they would be going with stock of contraband article – Brown Sugar towards Mirzapur through Jordan Road, Delhi Chakla traffic route. PW-3 Madarsinh Bhikhiji Solanki, PSI (Complainant), therefore, made an entry in the station diary to this effect and also informed his superior about

this secret information. Thereafter he called two panchas to the police station and made necessary preliminary panchnama and thereafter went to the place of incident along with his staff and panchas, and during the search of the person of A-2 he found contraband article – Brown Sugar weighing 443.1 gm. He, therefore called officer of the FSL. Before the search of the person of the accused who carried out, PW-3 Solanki informed the accused that he being a gazetted officer he was entitled to carry out the search. He further asked the accused that if they desired to be searched in presence of another gazetted officer or a Magistrate, the presence of such person could be arranged for. Both the accused had expressed no such desire to get themselves searched in presence of other gazetted officer or a Magistrate and indicated that PW-3 Solanki may carry out the search on their person. On recovery of the contraband article – Brown Sugar from A-2, an officer of the FSL, Photographer and a person who could weigh the seized substance, were called, and in their presence, the officer of the FSL verified that the contraband Article was Brown Sugar, and thereafter on weighing the contraband article – Brown Sugar, it was weighed 443.1 gm., and then he prepared two samples, 10 gms. each, in the presence of the panchas, for sending them to FSL. Thereafter they were handed over to PSO, and thus the raid was completed. Thereafter PW-

3 Solanki forwarded the complaint, muddamal and the accused, along with the relevant document for registration of the offence. Pursuant thereto, the offence came to be registered against A-2, A-1 and A-3, who is not before the Court, vide CR No. 5001/2000 and thereafter investigation was handed over to PW7 – Mukundsinh Balvantsinh Raj, I.O., who after taking over the investigation, made arrangement to forward the muddamal to FSL and also proceeded to record the statement of the relevant witnesses. On receipt of the FSL report and after obtaining the sanction of superior authority, PW-3 Mukundsinh Balvantsinh Raj, I.O. filed chargesheet against all the accused in the Court of Principal Sessions Judge, City Sessions Court, Ahmedabad for commission of the offence punishable u/s 21 of the NDPS Act.

4. The learned Additional Sessions Judge, to whom the case was made over for trial, framed charge against all the accused for commission of the offence u/s 21, read with Section 29 of the NDPS Act, which was read over and explained to them. As the accused pleaded not guilty to the charge and claimed to be tried, they were put to trial in Sessions Case No. 168 of 2000.

5. In order to bring home the charge levelled against the accused, the prosecution has examined in all eight witnesses and relied upon their oral testimonies, details of which have

been given in paragraph 7 of the impugned judgement and order as under:

No.	Name	Exh.
PW-1	Bansilal Vanmalidas Soni, Panch Witness	16
PW-2	Vinod Shantilal Panchal, Panch Witness	23
PW-3	Madarsinh Bhikhaji Solanki, Complainant	24
PW-4	Rumalji Shivaji, Crime Writer Head	40
PW-5	Akaldas Raghuram Pandya, Carried muddamal of the FSL.	42
PW-6	Ghanshyamsing Kanjibhai Vaghela (PSO-DCB Crime Branch)	45
PW-7	Mukumdsinh Balvantsinh Raj, I.O.	48
PW-8	Padamsinh Damlavat	52

6. To prove the culpability of the accused, the prosecution has also produced number of documents and relied upon the contents of the same, the details of which are enumerated in para 8 of the impugned judgement and order.

7. After the recording of the evidence of the prosecution witnesses was over, the trial Court

explained to the accused the circumstances appearing against them in the evidence of the prosecution witnesses and recorded their further statement as required under Section 313 of the Code. In their further statement, the accused denied the case of the prosecution by saying that they have been falsely implicated in the case. However, they did not lead any evidence nor did they examine any witness in support of their defence.

8. On appreciation, evaluation, analysis and scrutiny of the evidence adduced by the prosecution, the trial Court held that the complicity of A-1 and A-3, who are not before the Court, has not been established, as no contraband article – Brown Sugar was recovered from them. He, therefore, acquitted A-1 and A-3. So far as A-2 is concerned, it is held that the charge against A-2 stands proved beyond reasonable doubt as he was found with the contraband article – Brown Sugar weighing 443.1 gm. The trial Court, therefore, convicted A-2 for commission of the offence punishable under 21 of the NDPS Act and sentenced him to suffer RI for 10 years with fine of Rs.1,00,000/- and in default of payment of fine, RI for further period of 2 years. It is this judgement and order which has given rise to these two Criminal Appeals; one at the instance of A-2, who has filed Criminal Appeal No. 72 of 2002,

challenging the order of conviction and sentence passed against him and the other filed by the State of Gujarat, being Criminal Appeal No. 91 of 2002, challenging the order of acquittal of A-1.

9. Mr. Mahesh Bhavsar, learned advocate of A-2 has made the following submissions:

(i) There is no independent corroboration to the case of prosecution. The evidence of so called independent panch witness PW-2 is not helpful to the prosecution case as the witness has not categorically testified as to out of the two accused from whose possession the muddamal – Brown Sugar was recovered. Therefore, the A-2 should be given benefit of doubt.

(ii) As per the evidence of the PW-2, muddamal – Brown Sugar was packed in a plastic bag, whereas from the evidence, it is quite clear that the muddamal was put into a plastic container. Therefore, the recovery of the muddamal from the present accused is doubtful and it creates a doubt that muddamal seems to have been tampered subsequently and sealed again by the police.

(iii) The provisions of Section 42, 50, 52, 55 and 57 of NDPS Act are not complied with. The slips bearing the signature of the panchas were not affixed with gum on the container

containing the muddamal but the slips were wrapped on the container with the string. Therefore, it appears that muddamal was not properly sealed and there were all the possibilities for substituting the substance. In support of the aforesaid submission he has relied upon the decision of this Court in 89(1) FAC 153 and 2006(1) GLH 409. Therefore, the benefit of doubt should be given to the present accused.

(iv) Even sample seal which is sent to the FSL at page no. 557 of the proper book seems to be of NCD of Ahmedabad, whereas it is the case of prosecution that the plastic bottles / containers were sealed with the seal of Inspector of Police, DCB, Ahmedabad. This makes it clear that the FSL Officer has not compared the seal on plastic bottles containing on the muddamal article with the sample of the seal and mechanically made the endorsement in his report that the seal was intact and was as per the sample of the seal. Moreover, sending wrong sample of seal amounts to non-supply of sample of seal to the FSL for comparison. Therefore, the report sent by FSL is without comparing the seal on the muddamal. Thus, there is no evidence to prove that the seals found on the muddamal sent to FSL were the same that were put on the sample bottles immediately after seizure of the Narcotic substance.

Therefore, the report sent by the FSL cannot be report in respect of the substance which was seized from the accused. In support of the said submission the accused has relied upon the judgement of the Supreme Court, reported in 2005(3) SCC 59.

(v) So far as the compliance of Section 50 of NDPS Act is concerned, he has relied upon the judgement of the Supreme Court reported in 2005 (5) SCC 151. In the said judgement, the Supreme Court has observed that the officer proposing to effect the search and gazetted officer in whose presence search is to be conducted cannot be the same person. The officer proposing to effect the search cannot act in dual capacity. In the present case, from the evidence of PW-3 Solanki, the main officer of raiding party who carried out the search, it becomes very clear that PW-3 Solanki put the proposal to the accused that he is a gazetted officer, however, if the accused desired, they may be searched in presence of any other gazetted officer or Magistrate. Therefore, PW-3 Solanki was the gazetted officer and he gave an option to the accused detained to be searched in his presence, to be given under Section 50. Therefore, the requirement of Section 50 of the NDPS Act was not satisfied because the officer proposing to effect the search cannot act in dual capacity,

first as an officer authorized under Section 42 to search a person and second as a gazetted officer in whose presence the accused may opt to be searched. Therefore, the recovery of Narcotic substance seems to be doubtful and the accused has to be given benefit of doubt.

(vi) Even the muddamal Narcotic was in custody of PW-3 Solanki for a period of 45 minutes to 1 hour when it was brought at the shop of the merchant for the purpose of weighing the same. Therefore, there was all chances of substitution of muddamal Narcotic substance. Therefore, the benefit of doubt should be given to the present accused and the present accused may be acquitted of the charges leveled against him.

(vii) Even exh.29 – Panchnama makes it very clear that in FSL sample 10 gm. of Narcotic substance was packed whereas exh. 18 makes it very clear that 25 gm. Narcotic substance was received back from the FSL. Therefore, the substance, which was sent for testing to the FSL, may be different and not the substance seized from the accused. Therefore, the benefit of doubt should be given to the present accused and the present accused may be acquitted of the charges leveled against him.

On the aforesaid premises, he submitted that the Appeal deserves to be allowed by quashing

and setting aside the impugned judgement and order and acquitting A-2 of the offence with which he was charged. He, therefore, urged to allow Criminal Appeal no. 72 of 2002.

10. Mr. M.H.Barajia, learned advocate of A-1 against whom Criminal Appeal No. 91 of 2002 has been filed, has submitted that the acquittal recorded in favour of A-1 is on the basis of the evidence adduced by the prosecution and according to him A-1 was not found with the contraband article – Brown Sugar, and therefore, the impugned judgement and order does not call for any interference by this Court while exercising power u/s 378 of the Code. He also highlighted the settled principle enunciated by the Supreme Court as to under what circumstances the appellate Court can interfere in an order of acquittal, which is recorded on the evidence adduced before the trial Court. According to him, even if two views, on the facts and in the circumstances of the case are possible, then also the appellate Court cannot substitute its views by recording conviction by upsetting the acquittal recorded by the trial Court. He, therefore, submitted that the Criminal Appeal filed by the State of Gujarat, challenging the acquittal of A-1, deserves to be dismissed by confirming the judgement and order of acquittal recorded in favour of A-1. He, therefore, urged to dismiss the Criminal Appeal No. 91 of 2002.

11. Per contra Mr. K.T.Dave, learned APP for the State of Gujarat submitted that, by voluminous evidence produced by the prosecution, the complicity of A-2 is proved beyond reasonable doubt. He was caught red-handed with contraband article – Brown Sugar when he was apprehended by the police officer in the presence of panchnamas. So far as A-1 is concerned, according to him he was the rider of the scooter, therefore, he had a knowledge that A-2 was having contraband article – Brown Sugar with him. Therefore, the trial Court has not appreciated the evidence in proper perspective so far as A-1 is concerned. Therefore, according to him, so far as conviction recorded against the A-2 is concerned, it does not call for any interference whereas order of acquittal recorded in favour of A-1 requires interference of this Court by allowing the Appeal filed against him and thereby convicting him of the offence with which he was charged. He, therefore, urged to dismiss Criminal Appeal No. 71 of 2002 filed by A-2 and allow the Criminal Appeal No. 91 of 2002 filed by the State of Gujarat challenging the acquittal of A-1.

12. This Court has considered the submissions advanced by the learned advocates appearing for the parties and perused the impugned judgment and order. This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on

record which is read and re-read by the learned advocates for the parties with reference to broad and reasonable probabilities of the case. In light of caution sounded by the Supreme Court while dealing with NDPS cases, this court has examined the entire evidence on record for itself independently of the trial Court and considered the arguments advanced on behalf of the accused and infirmities pressed, scrupulously with a view to find out as to whether the trial Court has rightly recorded the order of conviction and sentence against A-2 and order of acquittal in favour of A-1.

13. At the outset, be it noted that to combat illicit drug traffic and drug abuse, both at the national and international levels, the penal provisions contained under the NDPS Act are stringent and punishment thereunder is harsh, therefore, as per the settled principles of criminal jurisprudence, the Court of law must insist on the strict compliance of the safeguards provided under the statutory provisions contained thereunder.

14. In this connection, it would be appropriate to refer to the observations made by the Supreme Court in the case of Bharatbhai Bhagwanjibhai v. State of Gujarat, AIR 2003 SC 7. In para 1 of the said judgment, the Supreme Court has observed as under:

> “The Statement of Objects and Reasons of the NDPS Act categorically records the

inadequacy of the existing legislation to combat illicit drug traffic and drug abuse, both at the national and international levels and it is by reason of such deficiencies in the existing laws, the legislature thought it prudent to consolidate the same and bring about a comprehensive legislation so as to meet the exigencies of the situation. A plain look at the provisions of the NDPS Act read with the Statement of Objects and the Preamble would depict the intent of legislature as regards the offences under the said consolidated legislation, which stands expressed in rather explicit language as one of the most heinous ones in nature. This Court, however, in consonance with criminal jurisprudence of the country has been insisting on strict compliance of the safeguards provided under the statute so as to be in tune therewith".

15. In view of the stringent penal provisions and harsh punishment provided thereunder and in view of the observations made by the Supreme Court in the above referred to judgment, we have to find out as to whether in instant case strict compliance of the safeguards provided under the statute have been observed by the Police Inspector during the course of search of the accused and seizure of the muddamal, contraband article, brown sugar and the trial court has considered the evidence in proper perspective and rightly recorded the order of acquittal in

favour of A-1.

16. In this connection we shall first refer to oral testimony of PW-3 Madarsinh Bhikhaji Solanki (Complainant) at Exh.24, who has arranged for raid and lodged the complaint on behalf of the State of Gujarat, against all the three accused persons. He has, inter alia, testified that he has received secret information that one Yasminbanu Noormohmed Shaikh, A-3, who was not before the Court, was running the business of selling contraband article – Brown Sugar through her persons in her house, situated at Mamuji Khancho Dadamiya Gali, Dariyapur. The information further stipulated that one Abbasmiya Sharifmiya Saiyed (A-1) would be coming driving a Scooter bearing registration No. GCC-2880 and Salim Alabaksh Ajmeri (A-2) would be rider and they would be going with stock of contraband article – Brown Sugar towards Mirzapur through Jordan Road, Delhi Chakla traffic route. PW-3 Madarsinh Bhikhiji Solanki, PSI (Complainant), therefore, made an entry in the station diary to this effect and also informed his superior about this secret information. Thereafter he called two panchas to the police station and made necessary preliminary panchnama and thereafter went to the place of incident along with his staff and panchas, and during the search of the person of A-2 he found contraband article – Brown Sugar weighing 443.1 gm. He, therefore called officer

of the FSL. Before the search of the person of the accused who carried out, PW-3 Solanki informed the accused that he being a gazetted officer he was entitled to carry out the search. He further asked the accused that if they desired to be searched in presence of another gazetted officer or a Magistrate, the presence of such person could be arranged for. Both the accused had expressed no such desire to get themselves searched in presence of other gazetted officer or a Magistrate and indicated that PW-3 Solanki may carry out the search on their person. On recovery of the contraband article – Brown Sugar from A-2, an officer of the FSL, Photographer and a person who could weigh the seized substance, were called, and in their presence, the officer of the FSL verified that the contraband Article was Brown Sugar, and thereafter on weighing the contraband article – Brown Sugar, it was weighed 443.1 gm., and then he prepared two samples, 10 gms. each, in the presence of the panchas, for sending them to FSL. Thereafter they were handed over to PSO, and thus the raid was completed. Thereafter PW-3 Solanki forwarded the complaint, muddamal and the accused, along with the relevant document for registration of the offence. Pursuant thereto, the offence came to be registered against A-2, A-1 and A-3, who is not before the Court, vide CR No. 5001/2000 and thereafter investigation was handed over to PW7 –

Mukundsinh Balvantsinh Raj, I.O., who after taking over the investigation, made arrangement to forward the muddamal to FSL and also proceeded to record the statement of the relevant witnesses. On receipt of the FSL report and after obtaining the sanction of superior authority, PW-3 Mukundsinh Balvantsinh Raj, I.O. filed chargesheet against all the accused in the Court of Principal Sessions Judge, City Sessions Court, Ahmedabad for commission of the offence punishable u/s 21 of the NDPS Act.

17. The prosecution thereafter has relied upon the oral testimony of PW-4 Rumalji Shivaji, PSI Crime Branch, Ahmedabad, working as a Crime Writer Head. He has testified that the muddamal – Brown Sugar was received by him which was kept in his custody and gave it to PW-5 Akaldas Raghuram Pandya at Exh.42 for entrusting the same to FSL.

18. The prosecution thereafter has relied upon the oral testimony of PW-6 Ghanshyamsingh Kanjibhai Vaghela, PSO – DCB Crime Branch at Exh. 45 who registered the offence against the accused on receipt of the complaint, panchnama, muddamal and report sent by PW-3 – Madarsinh Bhikhaji Solanki.

19. The prosecution thereafter relied upon the oral testimony of PW-7 Mukundsinh Balvantsinh Raj, I.O. at Exh. 48 who was entrusted the

investigation of the case. Lastly the prosecution has relied upon the oral testimony of PW-8 Padamsinh Damlavat at Exh.52 who is maintaining the register in police station.

20. We have perused the evidence very minutely. So far as the evidence against A-2 is concerned, according to us the prosecution has established the guilt of the accused for commission of the offence u/s 21 of the NDPS Act beyond reasonable doubt. He was found with conscious possession of the contraband article – Brown Sugar weighing 443.1 gm., the value of which in the international market is Rs.46,31,000/-. The very fact that the said narcotic substance – Brown Sugar was recovered from inside the shirt which shirt was inserted into his trouser is suggestive of the fact that being aware of the illegal trafficking that he was indulging into, A-2 had taken pains to ensure that the said packet containing the narcotic substance was not visible to the naked eye. Therefore, it can be said that A-2 was in conscious possession of contraband article – Brown Sugar. The panchnama exh. 29 finds independent corroboration in the testimony of PW-2 who has supported the prosecution version and has infact withstood the test of cross-examination quite well. The panch witness has clearly testified with regard to the fact of the narcotic substance being recovered from the shirt of one of the accused though, no

doubt, he has not testified specifically as to from which of the accused the muddamal was actually recovered. However, the panchnama exh. 29 clearly established that the narcotic substance was recovered from A-2. The FSL report exh. 49, establishes beyond reasonable doubt that the muddamal sample tested upon is a narcotic substance.

21. The only question which is required to be decided is as to whether stringent provision contained under NDPS Act have been complied with. The answer is in the affirmative. The I.O. has complied with all the stringent conditions contained under the NDPS Act. So far as the provisions contained u/s 42 of the NDPS Act is concerned, Exh.27, which is a note of information. On a perusal of the same, it is seen that PW-3 Solanki, PSI has recorded the said information in his station diary. Thereafter, he has also forwarded the said information to his superior officers on the same day. The said document is on record at exh. 28. Therefore, according to this Court, provision of Section 42 of the NDPS Act have been complied with. According to us, there is no manner of doubt that provision contained under Section 42 of the NDPS Act have been complied with by PW-3 Solanki, PSI, who has received the secret information and who has lodged the complaint on behalf of the State.

22.A perusal of the testimonial collections, shows that the requirement of Section 50 of the NDPS Act have also been complied with. In oral testimony, in complaint as well as in panchnama, it is stated that the accused were asked as to whether they wanted to be searched in presence of a gazetted officer or Magistrate. But both of them have replied in negative and thereafter PW-3 Solanki searched the persons of both the accused and during their search he found contraband article – Brown Sugar from the person of A-2 only. Therefore, according to this Court, provision of Section 50 of the NDPS Act have also been complied with.

23.It is feebly contended by Mr. Mahesh Bhavsar, learned advocate that panch no.1 has turned hostile and he has not supported the prosecution case, whereas panch no.2 has, though supported the prosecution case, given a different version than the prosecution case, and therefore, there is no independent evidence to support the evidence of the members of the raiding party, and therefore, the prosecution case cannot be relied upon.

24.A perusal of the evidence of PW-1 – Bansilal Vanmalidas Soni, at Exh.16, shows that he has not supported the prosecution case, and therefore he was declared hostile. So far as evidence of PW-2 Vinod Shantilal Panchal, at exh. 23 is concerned, it is also true that

though he has supported the prosecution case, he has given contrary version with regard to the recovery of the muddamal as well as other material aspect.

25. It is well settled that merely because the panch witnesses do not support the case of the prosecution, the case of the prosecution need not be thrown over-board as unreliable. It may be realised that the phenomenon of panch witnesses turning hostile to the persecution is not unknown and is ever on the increase. It needs hardly to be emphasised that the decision of a case does not depend solely on the question whether the panch witnesses support the prosecution or turn their back on it. If the decision of the case were to depend solely on the testimony of panch witnesses regardless of the evidence of police officers, in theory, it would be giving a right to veto to the panchas so far as that question of culpability of an accused is concerned, which is not permissible in criminal jurisprudence. It is well settled that without good ground being pointed out, testimony of police officer, if otherwise found to be true and dependable, cannot be discarded by Court on the ground that he is a police officer. On the facts and in the circumstances of the case, this Court finds that testimonies of P.W.3, Madarsinh Bhikhaji Solanki (Complainant) at exh. 24, P.W.4, Rumalji

Shivaji (Crime Writer Head) at exh.40, PW-5 Akaldas Raghuram Pandya (who carried muddamal of the FSL) at exh. 42, PW-6 Ghanshyamsing Kanjibhai Vaghela (PSO-DCB Crime Branch) at exh. 45, PW-7 Mukundsinh Balvantsinh Raj (I.O.) at exh. 48 and PW-8 Padamsinh Damlavat at exh. 52, are unimpeachable and is of sterling quality and from their evidence, the contents of the panchnama have been proved and it is given exhibit number as well. Therefore, according to this Court, the said panchnama can be relied upon to decide the complicity of the accused.

26. In view of the aforesaid, according to us, complicity of A-2 for commission of the offence u/s 21 of the NDPS Act has been fully established as he was found and caught red-handed with contraband article – Brown Sugar when he was apprehended by PW-3 Solanki, PSI and during the search of his person in presence of the panchas, the said contraband article – Brown Sugar was recovered from him and necessary formalities of search and seizure were made in presence of pacnhas and complied with the requirements and observed all the formalities contained under the NDPS Act, samples were sent to FSL after following the procedures under the NDPS Act.

27. On close scrutiny of the evidence on record, we find no infirmities in the findings, ultimate conclusion and the resultant order of

conviction and sentence recorded by the trial Court against A-2. We are in complete agreement with the said findings, ultimate conclusion and resultant order of conviction and sentence recorded by the trial Court against A-2, as according to us, no other conclusion is possible except the one reached by the trial Court in the facts and circumstances of the case.

28. In aforesaid view of the matter, there is no valid reason or justifiable ground to interfere with the impugned judgment and order of conviction and sentence recorded against A-2. The sentence awarded to A-2 is minimum and has to be maintained.

29. Now this takes us to Criminal Appeal No. 91 of 2002 filed by the State of Gujarat against the A-1, challenging the order of acquittal recorded in his favour.

30. A close scrutiny of the evidence of the prosecution witnesses in its entire width and breadth, so far as A-1 is concerned, admittedly he was driving the scooter and A-2 was the pillion rider. The fact that A-1 was riding the scooter and A-2 was pillion rider, is not sufficient to show that A-1 had a knowledge that A-2 was having contraband article – Brown Sugar in his possession. There is no evidence to the effect that there was any conspiracy or meeting

of minds on the part of A-1 and A-2 to commit any offence u/s 21 of the NDPS Act. There is nothing on record to even remotely suggest that A-1 and A-2 have any relation between them. There is no evidence on record that both the accused were in any manner linked with A-3 or that they had a common bond or interest in any activity mush less an illegal activity of trafficking in narcotics. The only circumstance that goes against A-1 is that he was riding the scooter on which A-2 was the pillion rider and from whom incriminating article is recovered.

31. In the case of State of Punjab V/s. Balkar Singh and another, (2004) 3 S.C.C. 582, the accused were alleged to have been found present at the place where about 100 bags of poppy were recovered. They were sitting on such bags and they have failed to give any satisfactory explanation for being present at that place. The Supreme Court held that mere being found to be present at the place where the poppy husk bags were found and the failure to give any satisfactory explanation for being so present did not prove that the accused persons were in possession of the said poppy husk bags.

32. In the case of Sorabkhan Gandhkhan Pathan and another vs. State of Gujarat, reported in (2004) 13 Supreme Court Cases 608, the Supreme Court has acquitted the accused No. 2 who was traveling in an auto-rickshaw by holding that no material was produced to establish that the

accused No.2 in that case had knowledge that accused No.1 was carrying contraband articles or was conniving with the said accused in carrying the contraband articles and hence conviction of accused No.2, in absence of any such material, only on the basis of his being in the auto-rickshaw was not sustainable.

33. In the case of Narcotics Control Bureau, Jodhpur V/s. Murlidhar Soni and others, (2004) 5 S.C.C. 151, the Supreme Court was concerned with a case where accused's father (since died) was carrying a cloth bundle containing contraband, and the role of the accused was only to take his father on his scooter to the place where they were allegedly arrested. There was no evidence showing that accused had knowledge that the bundle contained any contraband articles. In absence of any material showing conscious possession of the contraband by the accused and the accused's father being dead, it was held that accused cannot be said to be in possession of any contraband articles and hence, his conviction under Section 21 was rightly set aside by the High Court. The Court was also in agreement with the finding of the High Court that the statements of the accused persons have been obtained by the Prosecuting Agency under duress.

34. Applying the principals laid down by the Supreme court in the above referred to three judgments to the facts of instant case, it is true that A-

1 was riding the scooter whereas A-2 was occupying pillion seat and from A-2, contraband article – Brown Sugar was recovered. The prosecution has not placed any material on record to show any relation between both of them and since A-1 was not found with the conscious possession of contraband article – Brown Sugar, complicity of A-1 was not established and therefore, the trial Court has very rightly recorded the order of acquittal in favour of A-1. The trial Court has given cogent and convincing reasons in para 23 of the impugned judgement and order for arriving at that conclusion.

35. It may also be noted that so far as A-1 is concerned, State of Gujarat has challenged the order of acquittal by filing Criminal Appeal no. 91 of 2002. The principles which would govern and regulate the hearing of appeal by the High Court against an order of acquittal passed by the Trial Court have been very succinctly explained by the Supreme Court in the matter of **AJIT SAVANT MAJAGAVI VS. STATE OF KARNATAKA,** reported in AIR 1997 page 3255.

(a) In an appeal against an order of acquittal, the High Court possesses all the powers, and nothing less than the powers it possesses while hearing an appeal against an order of conviction.

(b) The High Court has the power to reconsider the whole issue, reappraise the evidence and

come to its own conclusion and findings in place of the findings recorded by trial court, if the said findings are against the weight of the evidence on record, or in other words, perverse.

(c) Before reversing the finding of acquittal, the High Court has to consider each ground on which the order of acquittal was based and to record its own reasons for not accepting those grounds not subscribing to the view expressed by the trial Court that the accused is entitled to acquittal.

(d) In reversing the finding of acquittal, the High Court has to keep in view the fact that the presumption of innocence is still available in favour of the accused and the same stands fortified and strengthened by the order of acquittal passed in his favour by the trial Court.

(e) If the High Court, on a fresh scrutiny and reappraisal of the evidence and other material on record, is of the opinion that there is another view which can be reasonably taken, then the view which favours the accused should be adopted.

(f) The High Court has also to keep in mind that the trial Court had the advantage of looking at the demeanour of witnesses and observing their conduct in the Court, especially in the witness box.

(g) The High Court has also to keep in mind that even at that stage, the accused was entitled to benefit of doubt. The doubt should be such as a reasonable person would honestly and conscientiously entertain as to the guilt of the accused.

36. In **ANOKH SINGH vs. STATE OF PUNJAB**, reported in AIR 1992 SC page598, Supreme Court has held that in an appeal against acquittal, the High Court should attach greater weight to appreciation of evidence by the trial Judge who had the occasion to watch the demeanour of the witnesses.

37. It is a cardinal principle of criminal jurisprudence that in an acquittal appeal if other view is possible then also appellate Court cannot substitute its own view by reversing the acquittal into conviction, unless the findings of the trial Court are perverse, contrary to the material on record, palpably wrong, manifestly erroneous or demonstrably unsustainable. (See Ramesh Babulal Doshi V. State of Gujarat (1996) 9 SCC 225). In the instant case, the learned APP has not been able to point out to us as to how the findings recorded by the tiral Court are perverse, contrary to material on record, palpably wrong, manifestly erroneous or demonstrably unsustainable.

38. On overall appreciation of evidence, this Court is satisfied that there is no infirmity in the reasons assigned by the trial Court for

acquitting the A-1. Suffice it to say that the trial Court has given cogent and convincing reasons for acquitting the A-1 and the learned A.P.P. has failed to dislodge the reasons given by the trial Court and convince this Court to take a view contrary to the one taken by the trial Court.

39. Seen in the above context, we do not find any valid reason or justifiable ground to interfere with the impugned judgment and order acquitting the A-1 of the offence with which he was charged.

40. On the wake-up of the aforesaid, we are not inclined to interfere with the impugned judgement of conviction and sentence recorded by the trial Court against A-2 as well as the judgement and order of acquittal recorded in favour of A-1. Hence, both the Appeals lack merit and deserves to be dismissed.

41. For the foregoing reasons, both the Appeals fail and accordingly they are dismissed.

(A.M.Kapadia,J)

(K.A.Puj,J)

Jayanti*